

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-3309

FREDERICK J. CALATRELLO, Regional Director, Region Eight of the National
Labor Relations Board, for and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner-Appellee,

v.

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLEE
NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION¹

On August 22, 2012, DHSC, LLC d/b/a Affinity Medical Center (“Affinity”) and the National Nurses Organizing Committee (“Union”) entered into a Consent Election Agreement (“Agreement”) where the parties agreed to a secret-ballot election conducted by National Labor Relations Board (“Board”) Regional Director Frederick J. Calatrello (“Regional Director”) to determine if Affinity’s eligible employees desired to be represented by the Union. (Consent Election Agreement, RE 1-6, PageID# 340–42.) The Agreement specified that the Regional Director would certify the results of the election, “including a certification of representative where appropriate, with the same force and effect in this case as if issued by the Board.” (*Id.* at PageID# 342.) The Regional Director was empowered to issue a certification under longstanding delegations of authority permitted by § 3(b) of the Act, 29 U.S.C. § 153(b), and codified at 26 Fed. Reg. 3911 and 29 C.F.R. § 102.62.

On August 29, 2012, the Regional Director conducted the secret-ballot representation election. (Report on Challenged Ballots and Objections, RE 1-6, PageID# 343.) Affinity filed objections, but none of those objections challenged the Regional Director’s authority to conduct the election or the January 3, 2012 appointments of Board members Sharon Block or Richard Griffin. After Affinity

¹ Additional facts concerning the representation election and Affinity’s post-election conduct can be found in the Regional Director’s July 28, 2014 Brief at pp. 3–20.

failed to submit any evidence in support of its objections to the election, as required under 29 C.F.R. § 102.69, the Regional Director dismissed the objections and certified that a majority of votes had been cast in the Union's favor. (*Id.* at PageID# 343–48; Revised Tally of Ballots, RE 21-1, PageID# 2121.) On October 5, 2012, the Regional Director certified the Union as the collective-bargaining representative of Affinity's employees. (Cert. of Representative, RE 1-4, PageID# 185.) Despite the certification, Affinity refused to recognize or bargain with the Union. (Pet.Ex.Q, ALJD, RE 1-3, PageID# 151.)

After investigating the Union's charges against Affinity's refusal to recognize or bargain with the Union, the Regional Director issued an administrative complaint. Based on that complaint, on June 14, 2013, the Acting General Counsel authorized the Regional Director to file the § 10(j), 29 U.S.C. § 160(j), petition in this case. (See Attachment.)

Affinity now argues that, because under *NLRB v. Noel Canning, Inc.*, 135 S.Ct. 2550 (June 26, 2014), the Board had no quorum as of January 2012, the Regional Director's delegated powers to conduct the August 29, 2012 election lapsed and he lacked the authority to certify the Union, citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). However, Affinity's challenge must fail because, as an initial matter, Affinity recognized the Regional Director's election certification authority when it entered into the Consent Election Agreement. In

addition, Affinity waived its claims by failing to first raise them during the representation case, as required under the Board's rules and the law of this Circuit, and again when it failed to raise its claims in its opening brief before this Court.² And, even if not waived, there is no merit to Affinity's contention that the Regional Director's authority to conduct the election ceased the moment the Board's membership dropped below its quorum requirement of three members. The Supreme Court, in *New Process Steel, L.P. v. NLRB*, 560 U.S. at 684 n.4, emphasized that its holding did not cast doubt on the Board's prior delegations of authority to nongroup members, such as the Board's Regional Directors.

II. ARGUMENT

A. AFFINITY WAIVED ITS CHALLENGES TO THE REGIONAL DIRECTOR'S AUTHORITY TO CERTIFY THE ELECTION RESULTS

Relying on the Supreme Court's decisions in *Noel Canning* and *New Process Steel*, Affinity argues (Reply Br. 13–21) that the Regional Director lacked authority to conduct the election and certify its results because the Board lacked a quorum at the time. Affinity contends that the delegation “fail[s]” and cannot be exercised when the Board lacks a quorum. (Reply Br. 17.)

² Affinity waived this argument on appeal by failing to raise this issue in its June 27, 2014 Opening Brief, as argued in the Regional Director's August 18, 2014 Motion to Strike Section IV of Affinity's August 12, 2014 Reply Brief and the Regional Director's September 4, 2014 Reply to Affinity's Opposition to that motion.

Affinity waived its challenge to the Regional Director's certification authority in the underlying unfair-labor-practice case by failing to timely raise it in the representation case. Not until the unfair-labor-practice case did Affinity, for the first time, challenge the authority of the Regional Director to issue the certification. That was too late under the Board's rules, as approved by this Court. *See NLRB v. Int'l Health Care, Inc.*, 898 F.2d 501, 504–505 (6th Cir. 1990) (employer cannot defend against refusal to bargain based on a claim of erroneous union certification “where the employer failed to timely avail himself of the administrative remedy of seeking review of the certification with the NLRB”); *see also Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (“[A] party must raise all of his available arguments in the representation proceeding rather than reserve them for an enforcement proceeding.”).

Because neither the Board nor this Court in an enforcement proceeding pursuant to § 10(e) or § 10(f), 29 U.S.C. § 160(e)–(f), will consider Affinity's belated challenges to the certification, the district court correctly rejected those arguments in the § 10(j) case and rightly concluded that there is reasonable cause to believe that Affinity violated § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by refusing to recognize and bargain with the Union. (Ord. Granting Pet. For Inj. Relief, RE 24, PageID# 2177.)

Given that Affinity waived its challenge to the Regional Director's authority in the underlying administrative case and on appeal of the district court's order, this Court should not consider it.

B. AFFINITY'S CHALLENGE TO THE REGIONAL DIRECTOR'S CERTIFICATION AUTHORITY HAS NO MERIT

Even if Affinity had not waived its challenge, it lacks merit. In arguing that the Regional Director's authority to conduct and certify the election lapsed when the Board lost a quorum,³ Affinity relies on *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687–88 (2010). But *New Process Steel* involved a different delegation to a different entity under a different provision of the Act. It is not dispositive here and does not preclude this Court from upholding the Board's longstanding delegation of authority to Regional Directors to conduct elections, even if the Board lacked a quorum when the election was conducted.

Section 3(b) of the Act, 29 U.S.C. § 153(b), authorizes the Board “to delegate to its regional directors its powers under section 9 [29 U.S.C. § 159] . . . to direct an election or take a secret ballot . . . ,” subject to discretionary review by the Board.⁴

³ Between January 4, 2012 and August 2013, the number of Senate-confirmed members on the Board was less than a quorum. While additional members had been serving under recess appointments, the Supreme Court held in *NLRB v. Noel Canning, Inc.*, 135 S.Ct. 2550 (June 26, 2014), that those appointments were invalid.

⁴ The applicable portion of §3(b) provides that the Board is authorized:

Congress amended § 3(b) in 1959 to add that authorization, having recognized that the Board had developed a vast backlog, including a large number of pending representation petitions. *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971); *Amalgamated Clothing Workers of Am., AFL-CIO v. NLRB*, 365 F.2d 898, 903 & n. 9 (D.C. Cir. 1966). The new authority was “‘designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.’” *Magnesium Casting Co.*, 401 U.S. at 141 (quoting Sen. Goldwater, a Conference Committee member). Acting on that authority, the Board in 1961 delegated decisional authority in representation cases to Regional Directors (26 Fed. Reg. 3887–88; 3911),⁵ and thereafter promulgated rules

to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

⁵ The delegation provides:

Pursuant to section 3(b) of the National Labor Relations Act, as amended, and subject to the amendments to the Board’s Statements of Procedure, Series 8, and to its Rules and Regulations, Series 8, effective May 15, 1961, and subject to such further amendments and instructions as may be issued by the Board from time to time, the Board delegates to its Regional Directors “its powers under section 9 to determine the unit

implementing that delegation. *See* 29 C.F.R. § 102.62; *Magnesium Casting*, 401 U.S. at 138. Those rules have remained in effect without interruption for more than half a century, and Regional Directors have routinely exercised the authority delegated by those rules throughout the intervening decades, including during those periods when the Board itself lacked a quorum.

Affinity acknowledges this valid delegation, but argues that the Regional Director's statutorily delegated authority lapsed when the Board lost quorum in January 2012, relying on *New Process Steel*. (Reply Br. 17, 19–20.) That case presented the question whether a two-member quorum of a three-member panel delegated all the powers of the Board could continue to exercise that delegated authority after the third Board member's appointment expired. The Supreme Court held that the two-member quorum of the three-member delegee group could no longer exercise the full power of the Board “when the group's membership falls below three.” 560 U.S. at 684.

Affinity erroneously contends that *New Process* invalidates not only the delegation of the Board's full powers to a two-member quorum of a three-member

appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof.” Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

panel of the Board, but also the delegation of election authority to non-members, such as regional directors. (Reply Br. at 19-20.) However, in *New Process Steel*, the Supreme Court recognized that delegations made to non-Board members, such as regional directors, “implicate[] a separate question” from delegations to Board members. *New Process Steel*, 560 U.S. at 684 n.4. Indeed, the Supreme Court explicitly stated that its “conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel.” *Id.* Since *New Process Steel* highlighted the distinction between delegations of the Board’s plenary authority to its own members and delegations of particular authorities to other entities within the agency, four Courts of Appeals have decided the question whether the loss of a Board quorum causes delegations to the General Counsel to lapse. All have held that they do not. *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013), *petition for cert. filed* (July 25, 2014); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert denied* 132 S.Ct. 1821 (2012); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853–54 (5th Cir. 2010).⁶ For the same reasons, the longstanding delegation to regional directors

⁶ These cases involved the Board’s delegation of authority to its General Counsel under §3(d), 29 U.S.C. § 153(d), to seek injunctions under §10(j).

of election certification authority remains valid and can be exercised during times when the Board lacks a quorum.

C. THE REGIONAL DIRECTOR HAD AUTHORITY TO FILE THE INJUNCTION PETITION

To the extent that Affinity challenges the Regional Director's authority to file the § 10(j) petition in district court due to the Board's lack of quorum (Reply Br. 17), this Court should also reject that challenge. In 2001, 2002, and 2011, the Board delegated to the General Counsel court-litigation authority, including the authority "to initiate and prosecute injunction proceedings under section 10(j)" during times when the Board lacks a quorum. *See* 66 Fed. Reg. 65,998, 65,998 (Dec. 21, 2001); 67 Fed. Reg. 70,628, 70,628 (Nov. 25, 2002); 76 Fed. Reg. 69,768, 69,768 (Nov. 9, 2011). The Acting General Counsel authorized the Regional Director to file the § 10(j) petition in this case under power given to him under those delegation orders. (See Attachment.) As noted above, courts have unanimously held that the valid delegation of § 10(j) authority to the General Counsel does not lapse when the Board loses a quorum. *See Kreisberg*, 732 F.3d at 140; *Frankl*, 650 F.3d at 1354; *Osthus*, 639 F.3d at 844; *Overstreet*, 625 F.3d at 853–54. Because the Acting General Counsel had the power to authorize the Regional Director to file this petition, the

absence of a Board quorum at the time the petition was filed has no impact on the district court's authority to grant injunctive relief.⁷

III. CONCLUSION

This Court should reject Affinity's arguments in Section IV of its Reply Brief; the district court did not err in concluding that reasonable cause exists to believe that Affinity violated § 8(a)(5) by refusing to recognize and the bargain with the Union.

Respectfully Submitted,

/s/ Jamison F. Grella
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October 28, 2014

⁷ In any event, as discussed in the Regional Director's Mot. to Strike, pp. 4–6, and supported by *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6th Cir. 2013), the Board's lack of a quorum does not impact the district court's or this Court's jurisdiction over the case. The Regional Director's response to Affinity's implied invitation to this Court to review its holding in *GGNSC* can be found in its Reply in Support of Mot. to Strike, pp. 2–3.

CERTIFICATE OF COMPLIANCE

I certify that the attached Brief has been produced in a proportionally spaced “Times New Roman” font of 14 points, contains approximately 2,430 words, and does not exceed ten (10) pages in length. It is, therefore, in compliance with the Court’s October 17, 2014 Order and Fed.R.App.P. 32(a)(7)(B).

/s/ Jamison F. Grella

Jamison F. Grella
Attorney,
National Labor Relations Board

Dated at Washington, D.C.

this 28th day of October, 2014.

CERTIFICATE OF SERVICE

This is to certify that, on this date, pursuant to 6th Circuit Rule 25, the Appellee National Labor Relations served its Brief electronically through the ECF System with the Clerk of the Court, which sent notification of such filing to Appellant's counsel.

/s/ Jamison F. Grella

Jamison F. Grella
Attorney,
National Labor Relations Board

Dated at Washington, D.C.
this 28th day of October, 2014.

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Date Filed	Docket Entry #	Document Description	PageID#
07/16/2013	RE 1	<p>PETITION (unsigned) for Injunctive Relief Under Section 10(j) of the National Labor Relations Act against DHSC, LLC. Filed by Frederick J. Calatrello.</p> <p>Attachments:</p> <p>RE 1-1 Civil Cover Sheet, RE 1-2 Brief in Support, RE 1-3 Petition Exhibits A-P, RE 1-3 Petition Exhibit Q, ALJ Decision (“ALJD”), RE 1-4 General Counsel's Trial Exhibits Part 1, RE 1-5 General Counsel's Trial Exhibits Part 2, RE 1-6 Joint Trial Exhibits, RE 1-7 Respondent's Trial Exhibits Part 1, RE 1-8 Respondent's Trial Exhibits Part 2, RE 1-9 Administrative Trial transcript (“Admin. Tr.”)</p>	<p>1–18</p> <p>19–21 22–64 65–148 149–184</p> <p>185–283 284–301 302–380 381–465 466–491 492– 1771</p>
10/22/2013	RE 21-1	Revised Tally of Votes	2121
01/24/2014	RE 24	ORDER Granting the Petition for Injunctive Relief (dated Jan. 22, 2014).	2174–82

ATTACHMENT

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UNITED STATES GOVERNMENT

memorandum

**NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

DATE: June 14, 2013

TO: Frederick J. Calatrello, Regional Director
Region 8

FROM: Lafe Solomon, Acting General Counsel

SUBJECT: DHSC, LLC, d/b/a Affinity Medical Center
Cases 08-CA-090083, 08-CA-090193, 08-CA-093035 and 08-CA-095833

Pursuant to the Board's delegation of court authority to me, I authorize the Regional Office to initiate Section 10(j) proceedings.

A handwritten signature in black ink, consisting of a large, stylized 'L' and 'S' intertwined. Below the signature, the initials 'L.S.' are printed in a small, sans-serif font.

cc: Board Members
Executive Secretary
Solicitor

Injlit/ILB.internalmemo.08-CA-090083.GCauthzn.doc